82-47

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

JAMES R. GAMBREL, ... Petitioner,

versus

KENTUCKY BOARD OF DENTISTRY, - Respondent.

RESPONSE TO A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

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No.

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v.

KENTUCKY BOARD OF DENTISTRY, - *Respondent.*

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COUNTERSTATEMENT OF THE CASE

The Appellee, Kentucky Board of Dentistry, does not accept the appellant's statement of the case and desires to set forth matters essential to a fair and adequate statement of the case before this Court.

This appeal arises from two similar actions which were consolidated for a non-jury trial. The two actions were: *Kentucky Board of Dentistry* v. *James Gambrel,* Jefferson Circuit Court, No. 237585, and *Kentucky Board of Dentistry* v. *James Renfro, Sr.,* Jefferson Circuit Court, No. 55789. Both cases involved actions by the Kentucky Board of Dentistry pursuant to KRS 313.020 to enforce the Kentucky Dental Law. One case involved an injunction in equity and the other case involved a violation of a previously existing injunction. The Appellee will only address the case of James E. Gambrel.

On December 5, 1976, the Appellee filed a verified Petition for an injunction and an Affidavit in Support of the Petition for Injunction pursuant to KRS 313.360. The Affidavit in Support of Injunction was signed by Mr. Donald White, Attorney at Law. The Petition states that the members of the Kentucky Board of Dentistry are duly appointed in accordance with the provisions of KRS 313.200 and that it is their duty to administer and enforce the provisions of that Chapter. Pursuant to KRS 313.020, no person shall practice or attempt to practice dentistry in the Commonwealth of Kentucky unless licensed to do so by the Board of Dentistry.

In the Affidavit of Mr. Donald White in support of the Petition of Injunction, the Affiant stated that on May 19, 1977, he visited the Gambrel denture studio in Louisville, Jefferson County, Kentucky, and that at this time and place, he met with the Appellant, James Gambrel. Mr. White, by the Affidavit, further states that Mr. James Gambrel examined his mouth and took an impression of his teeth, and it was agreed that he would pay the Appellant approximately One Hundred Seventy-Five Dollars ($175.00) for a partial plate. On April 24, 1978, the Jefferson Circuit Court, by its Order, scheduled a petition for injunction against James E. Gambrel, and set a hearing date of May 12, 1978.

On May 12, 1978, the Appellee laid the foundation for documentary evidence against James E. Gambrel. Carolyn Fitzmayer, Administrative Secretary to the Kentucky Board of Dentistry, stated that it is her duty

to maintain the records of individuals licensed to practice in the State of Kentucky, and that James Gambrel was not a licensed dentist. Mrs. Doris Denton of Louisville, Kentucky, testified that sometime during April of 1978 she had gone to Gambrel's denture studio on Durrett Lane to have an upper plate made. She states that she did not have a work order or prescription from a licensed dentist and that James Gambrel did not ask her for a prescription or a work order at that time. (T.E. Volume 1, May 12, 1978, page 86). She states that on her first visit, James Gambrel took an impression of her mouth, and that on the second visit, he fitted the dentures in her mouth and that on the third visit, he gave her the completed upper plate for which she paid him One Hundred Five Dollars ($105.00) by check. (T.E., p. 87).

The Appellee next called Mrs. Betty L. Adcock of Louisville, Kentucky. She stated that she went to see James Gambrel at his place of business on Durrett Lane, and that James Gambrel made both upper and lower full dentures for her. She states that the Respondent took impressions of her mouth and that she made four (4) different visits to see him. She further indicated that she did not have a work order or authorization or prescription from a licensed dentist and that Mr. Gambrel did not ask her for one. She further testified that she paid the Respondent One Hundred Seventy-Five Dollars ($175.00) and that she had last seen him when she picked up her dentures the

previous Friday, and that this transaction occurred in Jefferson County, Kentucky.

Mr. Donald White also testified on behalf of the Kentucky Board of Dentistry and stated that on May 19, 1977, he went to see James Gambrel at his denture studio. Mr. White testified that he did not have a work order or a prescription from a licensed dentist and that Mr. Gambrel did not tell him that one was necessary. (T.E. Volume 1, May 12, 1978, p. 92). Mr. White stated that he explained to Mr. Gambrel that he had broken an upper partial plate and needed a replacement. Mr. White further testified that the Appellant, Mr. Gambrel, took an impression of his mouth using a soft plastic material which the Appellant held in Mr. White's mouth during the time it took to harden the mold. Mr. White stated that he did agree to pay the Respondent for the approximate amount of One Hundred Seventy-Five Dollars ($175.00). (T.E. dated 10-18-78, p. 146).

ARGUMENT

THE PETITIONER WAS NOT DENIED DUE PROCESS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BY THE TRIAL COURT.

1. The Petitioner's Right to a Due Process Trial Was Not Violated by the Trial Court Joining for Trial the Case of the *Kentucky Board of Dentistry* v. *James Renfro, Jr.*

"All persons may be joined in one action as Defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same trans-

> action, occurrence, or series of transactions or occurrences, if any question of the law or fact common to all Defendants will arise in the action."

This rule shows that common questions of law and fact for joinder of parties are proper. A separate rule addresses itself to the consolidation of trials. Kentucky Civil Practice Rule 42.01 states as follows:

> "When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or a trial of any or all the matters at issue in the action; it may order all actions to be consolidated; it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Kentucky courts have consistently held that consolidation of cases is discretionary with the trial court and will not be overturned unless a clear abuse of discretion is shown. *Adams Real Estate Corporation* v. *Ward,* Ky., 458 S. W. 2d 622 (1970). Whether a seperate trial should be granted is a matter within the sound discretion of the trial judge. Before a jointly indicted Defendant is entitled to a separate trial, he must timely demonstrate to the trial judge that he will be prejudiced by a joint trial. *Bunton* v. *Commonwealth,* Ky., 464 S. W. 2d 810 (1971). *Rachael* v. *Commonwealth,* Ky., 523 S. W. 2d 395 (1975). This trial court did not abuse its discretion by consolidating these two actions for trial in view of the fact that both cases involved a common question of law as to whether

or not the Kentucky Statute KRS 313 concerning the illegal practice of dentistry was violated.

The Appellant cites as authority the case of *Compton* v. *Commonwealth,* Ky., 602 S. W. 2d 150 (1980), but this action only codifies long standing Kentucky cases which hold that the trial judge has broad discretion in granting or refusing to grant a severance, and the ruling will not be disturbed unless there is a clear abuse of discretion.

At this time, the Court should consider the facts surrounding the action against James Renfro, Jr., to determine whether the Petitioner was prejudiced.

The case against James E. Renfro, Jr. as presented by the Kentucky Board of Dentistry consisted of the following documentary evidence: the Kentucky Board of Dentistry proved that on or about June 12, 1961 the Kentucky State Board of Dental Examiners (now Kentucky Board of Dentistry) and James Renfro, Sr., entered into an Agreed Judgment whereby James Renfro was permanently enjoined and restrained from practicing dentistry or attempting to practice dentistry and/or the commission of any act defined in KRS 313.010. On December 20, 1976, the Kentucky Board of Dentistry filed a motion for rule for James Renfro to show cause, if any he had, why he should not be held in contempt for his failure to comply with this Court's order of June 2, 1961. This Motion for Rule was supported by the Affidavit of Lowell V. Thompson, Jr., then legal counsel for the Kentucky Board of Dentistry. In his Affidavit, the Affiant restated the terms of the Agreed Judgment and

stated that James Renfro had failed or refused to comply with the Court's order in that on or about May 26, 1976, James Renfro, Sr., engaged in the practice of dentistry without a license. The Affiant's Affidavit further stated that on or about October 4, 1976, a hearing was held in the criminal branch of the Jefferson Quarterly Court on a warrant taken by Carolyn Sue Snawder and that at said time and place, James Renfro was found guilty. The hearing on this contempt rule was scheduled for May 12, 1978, consolidated and to be heard at the same time as the injunction action against James Gambrel, since both actions involved the illegal practice of dentistry.

In addition to the Affidavit filed by Lowell V. Thompson, the deposition of Carolyn Sue Snawder taken on August 1, 1977, in the case of *James Renfro, Jr.* v. *Carolyn Sue Snawder, et al.*, Jefferson Circuit Court, Action No. 230565, was read into the record as evidence against James E. Renfro, Sr. This deposition was admitted into evidence pursuant to the Kentucky Rules of Civil Procedure 32.01 on June 2, 1978 for the reason that Carolyn Sue Snawder was prevented from attending the trial by illness. (T.E. dated 7-24-78, p. 22). It was learned on that date from attorney Frank W. Burke, counsel for Our Lady of Peace Hospital, that Mrs. Snawder had been subpoenaed by both sides, but that she was admitted to said hospital on May 23, 1978 and that she was under the care of Dr. Robert Lehman. Mrs. Snawder testified by deposition that prior to the taking of her warrant at the Jefferson County Quarterly Court on

May 27, 1976, she had gone to James Renfro, Sr. for the purpose of having dentures made. She stated that when she arrived, her mouth was examined by Mr. Dan Hauner, and that James Renfro, Sr. and James Renfro, Jr. were also present. She testified that Mr. Hauner spoke with James Renfro, Sr., and that Renfro, Sr., then took an impression of her mouth. (T.E., p. 32). She stated that approximately two weeks later she went back and picked up the finished dentures from James Renfro, Sr. and paid him One Hundred Sixty-Two Dollars Seventy-Five Cents ($162.75). She further testified by deposition, that she was dissatisfied with her teeth, and later contacted the Kentucky Dental Association who referred her to legal counsel. The record of the proceedings indicates that on October 4, 1976, James Renfro, Sr. was found guilty of practicing dentistry without a license in violation of KRS 313.020.

This rather lengthy trial ended on July 18, 1978, and the Court found James Renfro, Sr. in contempt of court and fined him Five Hundred Dollars ($500.00) and the Court also issued a permanent injunction against James E. Gambrel restraining him from violating the Dental Practice Act and from engaging in the illegal and unlicensed practice of dentistry.

These actions involved similar legal issues concerning alleged violations of KRS 313.010(2). Both Defendants were registered dental laboratory technicians charged with practicing dentistry without a license in violation of the aforementioned statute. The Peti-

tioner in both actions was the Kentucky Board of Dentistry.

Based on the similar set of factual circumstances and the court being required to determine if both registered dental laboratory technicians violated KRS 313.010(2), it is apparent that the court did not abuse its discretion in consolidating these cases for trial.

2. The Petitioner's Due Process Right to Counsel Was Not Violated.

The Defendants allege that they were not given an opportunity to have a fair trial based on the fact that the Defendants' counsel, Franklin Yudkin, allegedly became ill during one of the trial proceedings and left the courtroom on the afternoon of May 12, 1978 and went to visit the doctor for gastritis. The trial court's discretionary powers of passing upon applications for continuance based upon the illness of counsel clearly include the power of passing upon fact issues as to the existence of the alleged illness and its effect upon the ability of the attorney to be present and represent his clients. Appellate courts throughout the United States have been reluctant to interfere with the trial court's refusal of a continuance because of the insufficiency of the showing as to health or incapacity.

Pointing out that the Defendants' attorney must have been physically and mentally able to attend to the case on the trial since the defense interposed by them appeared from the record to have been ably presented, and there was no showing that injury resulted to their health from their labors, the court in *Crabtree*

Coal Mining Company v. *Samples Administrator*, 24 Ky. L. R. 1703, 72 S. W. 24 (1903), held that no error resulted from the denial of a continuance claimed on the grounds that the Defendant's attorneys were in too exhausted a state to go to trial, having been keeping watch with sick members of their family and engaged in court during the day for some time.

The Appellant wishes to comment on the factual background which led the trial court to make a determination that the Appellant's counsel was feigning sickness. Appellee has attached three (3) Affidavits by Index which states the events which transpired on May 12, 1978 shortly before Mr. Yudkin decided to leave the courtroom. These Affidavits are not only drawn by Appellee's counsel, but also by an impartial correctional officer named Lester H. Vest.

All three Affidavits referred to in the Index show that at approximately 5:00 p.m. on May 12, 1978, Mr. Yudkin asked Judge Charles Anderson to conclude the trial so that he could attend the Kentucky Bar Association banquet dinner scheduled that evening. Some minutes later, Mr. Yudkin stated that he could not believe that this trial was still continuing and the court instructed Mr. Yudkin that several lay witnesses were waiting outside of the courtroom to testify and that the judge wanted to hear their testimony so that it would not be necessary for them to return and be resubpoenaed to the court for another date. At approximately 5:45 p.m. Mr. Yudkin stated that he was tired and laid his head on a book while the trial was in progress. No one could see any objective signs of

sickness and apparently Mr. Yudkin was able to follow the proceedings and understand the nature of the testimony, because at one point, Mr. Yudkin's tape recorder went off, and he immediately raised his head and got one of his assistants to change the tape for him. Mr. Yudkin was apparently distressed and upset that the court would not continue the case to allow him to attend the banquet. Mr. Yudkin then got up without assistance and left the courtroom and did not return.

It is important to note that this was not a one day trial. After May 12, 1978, the case was continued until June 2, 1978 and subsequently to June 8, 1978 and subsequently to June 23, 1978. Any witnesses which Mr. Yudkin felt that he did not have an opportunity to examine, question or cross-examine, would have been available for trial at any subsequent date. There is nothing in the record to indicate that any of these people were even attempted to be resubpoenaed. It is also important to note that the Appellee made Mr. Donald White appear again and that he was called by the Appellants as an adverse witness and thoroughly examined again. There was no further showing at any subsequent time or any subsequent date of counsel's inability to try the case during this lengthy proceeding. It should be also noted that in subsequent proceedings, Mr. Yudkin was assisted by able counsel Shelton Gardner of Chicago, Illinois.

The courts have held that a denial for a motion for continuance in an injunction proceeding was not an abuse of discretion where a motion was based on certificates of hospital emergency interns and a doctor in-

dicating that counsel had upper respiratory tract infection since neither certificate indicated that counsel's health would be impaired by courtroom appearance and no further showing of inability to try the case was made during the five day proceeding. *Timmons* v. *South Carolina, Tri-Centennial Committee,* 254 S. C. 378, 175 S. E. 2d 805. It is apparent from a review of these facts and the Affidavits filed that the Appellants were not denied their right to counsel. It is also evident that the court did not abuse its discretion in refusing to continue this trial based on the statements and actions of defense counsel on May 12, 1978.

3. The Trial Court Did Not Deprive the Petitioner of His Constitutional Right to a Fair Trial.

The Petitioner alleges that the trial court denied him a fair trial because a witness was recalled to the stand for subsequent cross-examination by Petitioner's attorney, Franklin Yudkin. It is inconceivable that such action by the trial court would do anything but inure to the benefit of the Petitioner. The other twenty-two allegations concerning the trial court's alleged misconduct are totally without merit.

4. There Was Sufficient Evidence to Support the Finding of the Trial Court That James E. Gambrel Violated KRS 313.010 by Engaging in the Unauthorized Practice of Dentistry.

The Appellant correctly cites the KRS statute 313.010 which defines the practice of dentistry in the Commonwealth of Kentucky:

"Any person shall be regarded as 'practicing dentistry' who for a fee, salary or other reward paid or to be paid either to himself, or to another person, performs or advertises to perform dental operations of any kind or who diagnoses or treats diseases or lesions of the human teeth or jaws, or attempts to correct malpositions thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and the adjacent associated structures, or who takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written order or prescription of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist, . . ."

The Appellant correctly states that in order to find James E. Gambrel violated the above-mentioned statute, the Kentucky Board of Dentistry must prove that James E. Gambrel was paid or was to be paid a fee to take impressions of the human teeth or jaws to be used directly in the fabrication of an interoral appliance all without a written work order or prescription of a licensed dentist. The Appellant incorrectly states in their Brief that the Kentucky Board of Dentistry's case against James Gambrel "rested solely on the testimony of Donald L. White." In addition to the testimony of Mr. White, Doris Denton of 3712 Downing Lane, Louisville, Kentucky, was called by the

Board of Dentistry to testify against James Gambrel. Doris Denton stated that she had gone to James Gambrel's studio to have an upper plate made. Mrs. Denton stated under oath that she did not have a prescription or a work order from a licensed dentist when she went to see the Appellant, nor was she asked for one. (T.E. dated May 12, 1978, p. 86). Doris Denton states that James Gambrel took an impression of her mouth on her first visit and fitted her with the denture which he fabricated on the second and third visit. She stated that she paid James Gambrel One Hundred Five Dollars ($105.00) by check for her completed upper plate. (T.E. May 12, 1978, p. 87).

In addition to the testimony of Mrs. Denton, Betty L. Adcock of 213 Breckinridge Lane, Louisville, Kentucky also testified. Ms. Adcock states that she went to see James Gambrel and that the Appellant made both an upper and lower full set of dentures for her. She states that the Appellant took impressions of her mouth, and that she made four (4) different visits to see him and did not have a work order or authorization or prescription from a licensed dentist and the appellant did not ask her for any authorization from a licensed dentist. (T.E. Volume 1, dated May 12, 1978, pp. 89-91). Ms. Adcock further testified that she, in fact, paid Appellant One Hundred Seventy-Five Dollars ($175.00) and that this transaction occurred in Louisville, Jefferson County, Kentucky.

The Appellee's final witness, was in fact, Mr. Donald L. White of 2825 Dexley Court, Louisville, Kentucky. Mr. White testified that on May 19, 1977,

he went to Gambrel's denture studio on Durrett Lane and that he did not have a work order or prescription from a licensed dentist and that the Appellant did not tell him that one was necessary. (T.E. Volume 1, dated May 12, 1978, p. 92). Mr. White stated that he told Appellant that he had a broken upper partial plate and needed a replacement. Mr. White indicated that the Appellant took impressions of his mouth and that he agreed to pay the Appellant. Mr. White further testified that there was no dentist on the premises when he saw James Gambrel. (T.E. Volume 1, dated May 12, 1978, pp. 94-96). On June 23, 1978, during the presentation of the Appellant's case, Mr. Donald White was again called as a defense witness. At that time, Mr. White stated that:

> "When I dealt with him the understanding was that it would be in the vicinity of $175.00, while it is true he never quoted me an exact figure, it is also true that we dealt in terms of $175.00, more or less."

The evidence that James E. Gambrel violated KRS 313.010 was proven beyond any doubt. The Appellant did not take the stand to either refute any of the allegations made by the Appellee's witnesses, nor was any affirmative defense tendered.

CONCLUSION

For the reasons set forth above, the Respondent moves this Court to deny the Writ of Certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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